

APPEAL NO. 050736  
FILED MAY 18, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 2, 2005. The hearing officer resolved the disputed issues by deciding: (1) that the respondent (carrier) did waive the right to contest the C6-7 bulging disc of the cervical spine and a meniscus tear in the right knee by not timely contesting the \_\_\_\_\_, injury in accordance with Sections 409.021 and 409.022; (2) that the carrier did not waive the right to contest the left shoulder by not timely contesting the \_\_\_\_\_, injury in accordance with Sections 409.021 and 409.022; (3) that the compensable injury of \_\_\_\_\_, does extend to and include appellant's (claimant) C6-7 bulging disc of the cervical spine and a meniscus tear in the right knee; (4) that the compensable injury of \_\_\_\_\_, does not extend to or include claimant's left shoulder; and (5) that the claimant had disability beginning on May 13, 2003, and continuing through April 30, 2004, and at no other times. The claimant appealed, disputing the ending date of disability determined by the hearing officer as well as the waiver and extent-of-injury determinations regarding the left shoulder. The carrier responded, urging affirmance and arguing alternatively that the decision should be remanded back to the hearing officer for new findings. The hearing officer's determinations that the carrier waived the right to contest the C6-7 bulging disc of the cervical spine and a meniscus tear in the right knee by not timely contesting the \_\_\_\_\_, injury in accordance with Sections 409.021 and 409.022, and the determination that the compensable injury of \_\_\_\_\_, does extend to include claimant's C6-7 bulging disc of the cervical spine and a meniscus tear in the right knee were not appealed and have become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_. The claimant testified that he was a security driver for employer and was injured when lifting a tub filled with bags of money. The claimant further testified that the tub dropped on his right knee and caused his neck and head to strike the metal divider inside the armored truck he was driving.

EXTENT OF INJURY

The hearing officer determined that the compensable injury of \_\_\_\_\_, does not extend to or include the claimant's left shoulder. Although there is conflicting evidence on the issue of the extent of the claimant's compensable injury, we conclude that the hearing officer's determination that the claimant's compensable injury does not include an injury to the left shoulder is supported by sufficient evidence and is not so

against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

### **WAIVER**

The evidence reflects that the carrier received notice of the claimed injury on May 14, 2003. A Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) was in evidence dated May 16, 2003, which indicated that benefits would be paid as accrued and noted that the carrier is continuing to investigate the claim under Section 409.021(c). A TWCC-21 dated January 9, 2004 (filed January 12, 2004) was also in evidence, which reflected in part that the carrier disputed that the compensable injury extended to include bilateral shoulders. Other TWCC-21s were also in evidence which, disputed various aspects of this claim and were dated after January 2004. The hearing officer correctly notes in her Background Information portion of the decision that the waiver provisions of Section 409.021 do not apply to disputes of extent of injury. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3) and Texas Workers' Compensation Commission Appeal No. 042048-s, decided October 11, 2004.

The hearing officer specifically found that "the carrier could not have reasonably discovered the extent of the left shoulder injury within the first 60 days." The hearing officer's finding regarding waiver of the left shoulder injury is inartfully worded, however, the hearing officer made clear in her discussion that she applied the standard set forth in Texas Workers' Compensation Commission Appeal No. 041738-s, decided September 8, 2004. The nature of the injury that becomes compensable by virtue of waiver is defined by the information that could have been reasonably discovered by the carrier's investigation prior to the expiration of the waiver period. Appeal No. 041738-s, *supra*. Our review of the record supports the hearing officer's determination that the carrier did not waive the right to contest the left shoulder by not timely contesting the \_\_\_\_\_, injury in accordance with Section 409.021.

### **DISABILITY**

The hearing officer found that due to the claimed injury, the claimant was only unable to obtain and retain employment at wages equivalent to the preinjury wage beginning May 13, 2003, and continuing through April 30, 2004, and at no other times. In the Background Information portion of the decision, the hearing officer noted that "[c]laimant may never be able to go back to his 'heavy' demand job but on April 30, 2004 [c]laimant did pass the physical to be certified as a commercial driver." A "Medical Examination Report for Commercial Driver Fitness Determination" was in evidence. The report reflects that the examination was conducted on April 30, 2002, and that the medical certification expiration date is April 30, 2004. Both parties acknowledge in their respective request for review and response that the hearing officer erroneously cites the date of the claimant's commercial driver's license exam. The claimant appeals the ending date of disability found by the hearing officer, arguing that there is no evidence to support the finding that disability ended April 30, 2004. We agree. We reverse the hearing officer's determination that the claimant's disability ended on April 30, 2004.

We remand the disability issue back to the hearing officer to make a finding regarding the ending date of disability supported by the evidence.

We affirm the hearing officer's determinations on the issues of whether the carrier waived the right to contest compensability of the left shoulder and that the compensable injury of \_\_\_\_\_, does not extend to or include the claimant's left shoulder. We remand the disability issue back to the hearing officer for a determination of the ending date of disability supported by the evidence.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

The true corporate name of the insurance carrier is **AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM  
350 NORTH ST. PAUL STREET  
DALLAS, TEXAS 75201.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Robert W. Potts  
Appeals Judge